NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Brian J. O'Dowd, Assistant General Counsel

RE: Sitting or Former Member of State Council Seeking Paid Employment with that Council

DATE: October 16, 2009

Introduction

The Citizen's Ethics Advisory Board issues this advisory opinion at the request of John M. Flanders, a member of the Connecticut Council on Developmental Disabilities ("Council"). He asks whether a sitting or former Council member may seek paid employment with the Council, without violating the Code of Ethics for Public Officials, Chapter 10, part 1, of the General Statutes ("Code").

Background

The Council was established "to promote the full inclusion of all people with disabilities in community life."[1] It now has twenty-seven unpaid board members (appointees of the Governor), and a staff of three unclassified state employees, including two disability-policy specialists and an executive director, who is "hired/fired, evaluated and supervised by [the] Council."[2]

Because the current executive director, Ed Preneta, is retiring from that position in March 2011, the Council, which is responsible for hiring his successor, formed a transition committee (composed of some of its members) "to provide guidance and direction" in replacing him.[3] According to the transition committee, the executive-director position will be posted as of October 1, 2010, and Council members "who intend to apply for the position must resign from the Council

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[1]http://www.ct.gov/ctcdd/site/default.asp.

[2]Email from Ed Preneta, executive director, CT Council on Developmental Disabilities, to Brian O'Dowd, assistant general counsel, Office of State Ethics (September 2, 2009) (on file with the Office of State Ethics).

[3]Minutes of CT Council on Developmental Disabilities Transition Committee Meeting (February 19, 2009).

before October 1, 2009 (one year before the posting takes place)."[4] The latter statement presumably stems from a February 2006 informal staff letter issued by the Office of State Ethics to Mr. Preneta, concluding that "a Council member may not, for one year after leaving [the Council], apply for and accept a paid position on the Council staff."[5]

In a July 2009 letter to the Office of State Ethics, Mr. Flanders challenges that conclusion, arguing that it finds no basis in "State Ethics regulations," and asks the Citizen's Ethics Advisory Board to clarify the rules "regarding the ability of members of a state Commission to apply for employment with that commission."[6]

Question

We consider two questions: whether a sitting Council member may apply for and accept the executive-director position, and if not, whether a former Council member may do so.

Conclusion

We conclude that a sitting Council member may not apply for and accept the executive-director position, and that a former Council member may not do so for one year after leaving the Council.

Analysis

1. Sitting Council Member

As to whether a sitting Council member may apply for and accept the executive-director position, the relevant Code provision is General Statutes § 1-84 (c), which prohibits a public official from using "his public office . . . to obtain financial gain for himself . . . ."

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[4]Id.

[5]Request for Advisory Opinion No. 4203 (2006).

[6]Letter from John M. Flanders to the Office of State Ethics (July 24, 2009) (on file with the Office of State Ethics). Mr. Flanders also states: "if it is the [Citizen's Ethics Advisory Board's] preliminary opinion that Council members must have terminated their membership at least one year prior to the posting, I request leave to appeal that opinion." Id. Mr. Flanders need not make this request, as "Advisory opinions rendered by the board . . . shall be deemed to be final decisions of the board for purposes of appeal to the superior court, in accordance with the provisions of section 4-175 or 4-183." General Statutes § 1-81 (a) (3).

Section 1-84 (c) has been applied, by way of informal staff letter, to very similar fact patterns on no fewer than three occasions, in

- Request for Advisory Opinion No. 4203 (2006) (concluding that a sitting member of the Connecticut Council on Developmental Disabilities *may not* apply for a paid position on the Council staff),

- Request for Advisory Opinion No. 2763 (2001) (concluding that it is "clear" that a sitting member of a board charged with overseeing the Office of Managed Care Ombudsman *may not* "apply for a paid position in the agency that he or she oversees"), and

- Request for Advisory Opinion No. 1721 (1997) (concluding that a sitting member of the Board of Trustees of the Community Technical Colleges *may not* accept appointment to a paid position created by the Board and subject to its confirmation).

In the last of those informal staff letters, a State Ethics Commission ("SEC") attorney explained that § 1-84 (c) prohibits even an inadvertent use of office for personal financial gain, and quoted a prior advisory opinion for this proposition: that "there seems to be no doubt that there are inherent conflicts of interest when an employee is also . . . a full member of the body which is the employer."[7] The SEC attorney then concluded that "the other Board members [here] are placed in the untenable position of having to decide whether to hire one of their own."[8]

The language regarding untenability was taken from Advisory Opinion No. 96-2, in which a public official/member of the Bridgeport Port Authority ("BPA") was prohibited from entering into a contract with the BPA. After quoting the same language as above regarding inherent conflicts of interest, the SEC explained that, because "fellow [BPA] members must select, supervise, and critique the performance of such contract,"[9] they "would be placed in the *untenable* position of supervising and critiquing a fellow commissioner."[10] In that instance, it reasoned, "a use of office, however inadvertent, was unavoidable."[11]

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[7]Request for Advisory Opinion No. 1721 (1997), quoting Advisory Opinion No. 82-9 (concluding that a student member of the Board of Trustees for the State Colleges may not seek employment with a college under the Board's jurisdiction), overruled on other grounds by Advisory Opinion No. 93-2.

[8]Request for Advisory Opinion No. 1721 (1997).

[9]Advisory Opinion No. 99-7, discussing Advisory Opinion No. 96-2.

[10](Emphasis added.) Advisory Opinion No. 96-2.

[11]Advisory Opinion No. 99-7, discussing Advisory Opinion No. 96-2.

Two subsequent SEC rulings cite to Advisory Opinion No. 96-2 and conclude likewise.[12] The first, Declaratory Ruling 96-A, holds that a state commissioner may not accept "other employment with his or her own agency," as "[i]t would be unrealistic to assume that the Commissioner's state position would not influence decisions of his subordinates or his peers." The other, Advisory Opinion No. 99-7, holds that the consulting business of a member of the Board of Trustees of the University of Connecticut may not "enter into a contract with the University, [if] the Board of Trustees is charged with awarding and supervising such a contract."

We took this line of opinions even further in Advisory Opinion No. 2007-10. The facts there involved an Office of Policy and Management ("OPM") employee who was, by virtue of that position, a member of the board of directors of Connecticut Innovation, Inc. ("CI"), a quasi-public agency.[13] A question was raised as to whether he could resign from the CI board, but remain an OPM employee, and then seek to be hired by the CI board as the executive director of CI.[14] Because the individual was still a state employee (at OPM), the revolving-door provisions did not apply to him, so we looked to § 1-84 (c) and stated: "a sufficient amount of time must pass . . . to suggest that a former [board member] did not even inadvertently use his or her office or influence while on the Board to secure the position in question."[15] Thus, we adopted a one-year cooling-off period, concluding that the former CI board member "may not seek employment as CI's executive director for one year from the date he or she ceases to be a" board member.[16]

If those facts (i.e., a *former* board member seeking employment from the very board on which he sat) were deemed problematic under § 1-84 (c), then the facts before us most certainly are so—given that a *current* board member is seeking to be employed by the very board on which he sits. The concern in Advisory Opinion No. 2007-10 about an inadvertent use of influence while on the Board to secure paid employment is even more acute here, as the individual seeking employment *is still a board member*. That being the case, we conclude, in accord with the above-cited precedent, that § 1-84 (c) prohibits a sitting Council member from applying for and accepting the executive-director position.

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[12]A prior advisory opinion also concludes likewise: In Advisory Opinion No. 91-18, the SEC prohibited a member of the Health Care Access Commission from entering into a contract with one of its members.

[13]Advisory Opinion No. 2007-10.

[14]Id.

[15]Id.

[16]Id.

Before moving on to the second question, we address Mr. Flanders's argument to the contrary, which is this: that § 1-84 (c) is irrelevant here, because a Council member who applies for the position would abstain from the hiring decision and thus could not be said to be "using his office to obtain financial gain."[17]

We reject that argument on two grounds, the first being that prior advisory opinions have already rejected it. For instance, in Advisory Opinion No. 99-7, the SEC was asked whether the company of a member of the UConn Board of Trustees ("UConn trustee") could enter into a contract with the University. The SEC noted that Advisory Opinion No. 85-1 had concluded (in line with Mr. Flanders's argument) that a UConn trustee's company may do so, provided "the trustee did not participate in the vote on the approval of the contract."[18] But in the very next sentence, the SEC observed that this 1985 ruling "was modified in a later Advisory Opinion."[19] That is, it was modified in Advisory Opinion No. 96-2, which, in a blanket fashion, prohibited a member of the Bridgeport Port Authority from entering into a contract with that entity (regardless of his abstention from the selection process). Thus, Advisory Opinion No. 99-7—in direct contrast to the 1985 opinion—concludes that a UConn trustee's company may *not* enter into a contract with the University if "the Board of Trustees is charged with awarding and supervising the contract" (again, regardless of his abstention from the selection process).[20]

The other ground for rejecting Mr. Flanders's argument is that it presumes that, to avoid violating § 1-84 (c), a Council member can simply abstain from the hiring process—which is simply not the case, as is demonstrated in Advisory Opinion No. 98-23. There, the executive director of the Connecticut Commission on Children ("CCC") asked whether she could hire CCC board members (i.e., her superiors) to serve as paid instructors for its Parent Leadership Training Program.[21] According to the SEC, it "would constitute an improper use of office, however inadvertent, in violation of . . . § 1-84 (c)" for the board members to accept these paid positions.[22] The SEC explained that "[a]n impropriety under the Code would arise here not because of the intent of the parties, which is no way in question, but due to *the inherent nature* of the subordinate/superior relationship."[23]

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[17]Letter from John M. Flanders to Brian O'Dowd, assistant general counsel, Office of State Ethics (August 7, 2009) (on file with the Office of State Ethics).

[18]Advisory Opinion No. 99-7.

[19]Id.

[20]Although Advisory Opinion No. 99-7 implicitly overturns Advisory Opinion No. 85-1, in adopting this advisory opinion, we do so explicitly, in regard to its interpretation of § 1-84 (c).

[21]Advisory Opinion No. 98-23.

[22]Id.

[23](Emphasis added.) Id.

As there, an impropriety would arise here, not because of the intent of the Council member seeking the executive-director position or that of his fellow Council members. Rather, it would arise because of the inherent nature of the relationship between members of such boards, a reality recognized under the common-law doctrine of incompatibility of offices (and in the string of opinions discussed above[24]).

The common-law incompatibility doctrine, as noted in Advisory Opinion No. 82-9, "was developed to protect the public's interest in the proper and impartial performance of governmental duties." Under this doctrine, one court observed: "It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint."[25]

A seminal case in this regard is *Meglemery* v. *Weissinger*.[26] Meglemery, a member of a county fiscal court, was appointed by that body to the paid position of bridge commissioner.[27] Three days after his appointment, his term of office on the appointing board expired, and three months later he was removed from the position of bridge commissioner.[28] He brought suit seeking reinstatement, and the court rejected it, stating that, because Meglemery was "a member of the body that appointed him to fill this place, the appointment was void for reasons of public policy . . . ."[29] The court deemed it irrelevant that Meglemery's term had expired within a few days after his appointment, and that he was absent when his appointment was made.[30] It then explained (and this deserves extensive quote):

> It is of the highest importance that . . . bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are

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[24]See footnote 25.

[25]*Ehlinger* v. *Clark*, 117 Tex. 547, 8 S.W.2d 666 (1928). We note that the statement in *Ehlinger* as to "the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body" is simply another way of saying what was stated above (and in almost every advisory opinion discussed above): namely, that "there seems to be no doubt that there are inherent conflicts of interest when an employee is also . . . a full member of the body which is the employer." Advisory Opinion Nos. 82-9, 91-18, 96-2, 99-7, and Declaratory Ruling 96-A.

[26]140 Ky. 353, 131 S.W. 40 (1910).

[27]Id., 354.

[28]Id.

[29]Id.

[30]Id., 354-55.

> entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford, to place the other members under obligations that they may feel obliged to repay. Few persons are altogether exempt from the influence that intimate business relations enable associates to obtain, and few strong enough to put aside personal considerations in dispensing public favors. And it is out of regard for this human sentiment and weakness, and the fear that the public interest will not be so well protected if appointing bodies are not required to go outside their membership in the selection of public servants, that the rule announced has been adopted, and ought to be strictly applied.[31]

Put slightly differently, by another court prohibiting a board from appointing one of its own to an office:

> It cannot make any difference whether or not his own vote was necessary to the appointment. The opportunity improperly to influence the other members of the board is there. No one can say in a given case that the opportunity is or is not exercised. What influenced the other members to vote as they did, no one knows except themselves. Were their motives proper, based solely on the fitness of the appointee? They may have been. Were they improper, based on the promise or expectation of reciprocal favors? They may have been. No one knows, except the parties directly interested. That is the difficulty. This is the possibility, which the law should remove by determining such appointments to be illegal.[32]

These cases provide persuasive authority for our conclusion, which, to reiterate, is that § 1-84 (c) prohibits a sitting Council member from applying for and accepting the executive-director position.

2. Former Council Member

Having concluded that a sitting Council member may not apply for and accept the executive-director position, we now address whether a former Council member may do so.

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[31]Id., 355.

[32]*Wood* v. *Whitehall*, 120 Misc. 124, 125, 197 N.Y.S. 789 (1923).

The Code section that applies here is General Statutes § 1-84b (b)—the cooling-off provision—the purpose of which is to establish "a 'cooling off' period to inhibit use of influence and contacts with one's former agency colleagues for improper financial gain."[33] Section 1-84b (b) provides, in relevant part, as follows:

> No former executive branch . . . state employee shall, for one year after leaving state service, *represent anyone*, other than the state, for compensation before the department, agency, board, commission, council or office in which he served at the time of his termination of service, concerning any matter in which the state has a substantial interest. . . .[34]

In Advisory Opinion No. 89-25, the SEC applied that language to this issue: whether a former state employee could, within one year of leaving state service, return on a contractual basis to his former state agency. And its analysis of the issue proceeded thus: the language in § 1-84b (b) prevents a former state employee from representing "anyone" other than the state before one's former agency; in seeking consulting work with one's former agency, a former state employee would be representing someone other than the state—namely, oneself; and because there is no exception for "representation of oneself," § 1-84b (b) does not allow a "former employee who wishes to contract with his or her former agency to do so within one year after leaving the agency."[35]

A month later, the SEC issued Advisory Opinion No. 89-25 (Amended), responding to concerns that its previous opinion would (because of state downsizing and privatization) prevent the state from carrying out its essential functions. Convinced that a limited regulatory exception to § 1-84b (b) was appropriate in this situation, the SEC expressed its intent to issue a regulation allowing "a former state official or employee to have personal contact with his or her former agency within one year after leaving state service for the purpose of being reemployed (as either a state employee or an independent contractor) by that agency."[36] To "insure that this reemployment is utilized to take advantage of the former employee's expertise, and not as an improper reward for past favors or friendships," the SEC added this caveat: "that the reemployment be at no greater pay level than the individual was receiving at the time of separation from state

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[33]Advisory Opinion No. 98-21.

[34](Emphasis added.)

[35]Advisory Opinion No. 89-25.

[36]Advisory Opinion No. 89-25 (Amended). Although this exception never made its way to the Code's interpretive regulations, it has been kept afloat through advisory opinions. See, e.g., Advisory Opinion Nos. 2004-15, 2002-18, 2001-4, 98-21.

service, plus necessary expenses if the work is performed as an independent contractor."[37]

The problem here is two-fold. First, as noted in Advisory Opinion No. 2007-10, this is a *reemployment* exception, and "the word 'reemploy' assumes a prior employment relationship"—something that would not have existed between the Council and one of its former *unpaid* members. The second problem (which relates to the first) is that, under this exception, a Council member may have contact with the Council within one year of leaving state service for the purpose of being reemployed, if (and only if) the reemployment is at no greater pay level than the Council member was receiving at the time of separation from state service—which was zero. Thus, no matter what the pay level of the executive-director position, because that position is a paid one, its pay level most certainly exceeds that of a former unpaid Council member.

Because this exception to § 1-84b (b) does not apply here, the provision's general rule stands, meaning that a former Council member may not apply for and accept the executive-director position for one year after leaving the Council.[38]

[37]Advisory Opinion No. 89-25 (Amended.)

[38]See Advisory Opinion No. 2007-10 (concluding that a former member of the Board of Directors of Connecticut Innovations, Inc., "may not, within the one-year period set forth in § 1-84b (b), appear before [Connecticut Innovations, Inc.] for the purpose of being employed" as its executive director).